OCBC BANK (MALAYSIA) BHD

v.

AU KEE SIAN & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO. 24-1488-2000]
28 OCTOBER 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - National Land Code, s. 256(3)*

The defendants, in consideration of various banking facilities granted by the plaintiff bank to one Meko Offset Printing Sdn Bhd ('the borrower'), created a third party charge over certain property ('the said property') in favour of the plaintiff. Since the borrower defaulted in the payments, the plaintiff commenced these foreclosure proceedings. The defendants, however, contended that since this was a third party charge and the borrower had indicated in its letter dated 18 April 1995 ('the borrower's letter') that by 31 January 1998, the borrowing would have been gradually reduced so much so that by that date, the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the defendants' charge.

Held:

[1] The conduct of the plaintiff in giving further credit after agreeing with the borrower's proposal as contained in the borrower's letter had clearly satisfied the court that the grant of an order of sale would be contrary to equity and good conscience as envisaged under the third category by the Federal Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd*, where the three categories of cases in which "cause to the contrary" within the meaning of s. 256(3) of the National Land Code might be established, were laid down. Although the plaintiff had cited numerous authorities to show that the defendants had, by the terms of the charge, signed away their contractual rights, the borrower's letter and the bank's agreement to comply dated 18 January 1996 protected the rights of the defendants.
(p 308 f-h)

[Plaintiff's application dismissed.]

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***
PhileoAllied Bank (M) Bhd v. Narendran Thambimuthu [1999] 8 CLJ 394 HC ***(foll)***

Legislation referred to:
National Land Code, ss. 256(3), 340

For the plaintiff - Christina Siew; M/s Lim Kian Siew & Co
For the defendants - LK Saw; M/s Saw Lip Khai & Co

[The plaintiff has appealed to the Court of Appeal vide Civil Appeal No: P-02-770-02.]

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

The plaintiff bank granted various banking facilities to one Meko Offset Printing Sdn. Bhd (the borrower). In consideration thereof the defendants created a third party charge over land held under Lot No 2764, Geran No. 29426 Bandar Tanjong Bungah, Daerah Timor Laut, with a house No. 34 Jalan Azyze Hillside, 11200 Tanjung Bungah, Pulau Pinang situated on it (the said property) in respect of the said banking facilities in favour of the plaintiff. Since the borrower defaulted in the payments the plaintiff commenced these foreclosure proceedings.

Findings Of The Court

All that the defendants had to show was that there was a cause to the contrary pursuant to s. 256(3) of the National Land Code 1965 (the NLC). The task of this court has been made much simpler after the decision of the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 FC which held that 'cause to the contrary' within the meaning of s. 256(3) of the NLC might be established only in three categories of cases namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC.

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale;

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

In this case the defendants referred me to a letter from the borrower dated 18 April 1995 and addressed to the plaintiff and copied to the defendants and which reads as follows:

The Vice-President/Manager,
OCBC Bank Berhad,
Beach Street, Penang.

Dear Sir,

A/C No: 7301-062630-01

We have the pleasure to inform you that during our EGM held on 6th April, 1995 we have come to resolve the following:

That the Company's bank borrowing with you pledged under 3rd Party Charge on property at No. 34, Jalan Azyze, Tanjung Bungah, Hillside, Penang, to be reduced as follows:

1. a) by 31.12.1995 borrowing to be reduced by RM50,000.00

   b) by 31.12.1966 borrowing to be reduced by another RM100,000.00.

   c) by 31.12.1997 borrowing to be reduced by another RM100,000.00.

   d) by 31.01.1998 the property to be fully redeemed and discharged.

2. the company shall limit from issuing cheques exceeding the RM380,000.00 limit granted by your bank.

Kindly abide to our above requests which shall take immediate effect from the date hereof and keep us informed from time to time on our credit limit. And also, we request you to inform the Owners of the property from time to time, as and when, the limit is scaled down.

Thank you.

Yours faithfully,
FOR & ON BEHALF OF
MEKO OFFSET PRINTING SDN BHD

t.t. Managing Director

c.c. Au Kee Sian
c.c. Mdm Ngiam Seng Lian

The bank agreed to do so by its letter dated 18 January 1996 which reads as follows:

Our ref: QKS/CBE

18th January 1996
Memo Offset Printing Sdn Bhd
110 Kampung Java Baru
Off Jalan Dato Kramat
10150 Penang

Dear Sirs,

Re: Overdraft Facility of RM380,000 (Account No: 730-106263-0)

As requested we have today reduced the OD limit from RM380,000 to RM330,000.

2. Kindly operate your accounts within the limit of RM330,000.

Yours faithfully,
t.t.
Quah Kim Swee
Assistant Manager

It is the plaintiff's case that since the borrower had not paid the sums due, the bank therefore could not gradually reduce the debt. But this is not true because the defendants had exhibited the plaintiff's bank statement of the borrower which showed that as of 31 August 1998 the borrower had indeed made various payments amounting to RM205,000 thereby reducing the debt as of that date to RM74,199.26. In spite of the 1st defendant having sent a letter dated 5 May 1999 to the plaintiff in which the 1st defendant had reminded the plaintiff that pursuant to the plaintiff's own solicitor's letter dated 22 July 1999 the outstanding sum due under the letter of credit account was only RM262,000 and whereby the 1st defendant sought a breakdown of all the unpaid letters of credit and their respective dates of issue, the plaintiff did not respond.

It is the defendants' contention that since this is a third party charge and since the borrower had indicated that by 31 January 1998 the borrowing would have been gradually reduced so much so that by that date the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the defendants' charge. In my view the conduct of the plaintiff in giving further credit after agreeing with the borrower's proposal as contained in the borrower's letter dated 18 April 1995, clearly has satisfied this court that the grant of an order for sale would be contrary to equity and good conscience as envisaged under category (iii) by the Federal Court in *Low Lee Lian (supra)*. Whilst the plaintiff had cited numerous authorities to show that the defendants had by the terms of the charge signed away their contractual rights I must hasten to add that even if that be so, the borrower's letter dated 18 April 1995 and the bank's agreement to comply dated 18 January 1996, have, in my view, protected the rights of the defendants.

In *PhileoAllied Bank (M) Bhd v. Narendran Thambimuthu* [1999] 8 CLJ 394 I had held that on an application for sale of land charged, the court has not only to apply the law but also to invoke the aid of equity in order to be

satisfied whether "cause to the contrary" has been shown. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order.

Applying that same principle to this case I dismissed the plaintiff's application with costs.